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IN THE

Supreme Court of the United States

October Term, 1946

No. 320

NEWTON W. ELLIS

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FOREWORD

The Petition for the Writ, filed herein on July 22, 1946, and served upon counsel for Respondent with the printed Record on September 25, shows but little consideration for this Court or the Supreme Court of Nebraska. Except for appropriate headings and arrangement, neither the Petition nor its supporting brief appears to have been "carefully prepared * * * with *studied accuracy, brevity*

and clearness" to present what is essential to ready and adequate understanding of the points requiring the attention of this Court. *Furness-Withy & Co., Ltd., v. Yang-Tsze Insurance Association, Ltd.*, 242 U. S. 430, 434. The so-called "summary statement of the matter involved," found in the Petition at pages 3-33, is not accepted as an accurate statement of the facts by Respondent. It, as well as much of Petitioner's argument, is a superficially plausible mixture of fact, fiction and omission, which creates a distorted impression of the undisputed evidence presented by the Record. It appears to have been presented in this manner by Petitioner with the expectation that this Court would confine its study to the Petition and supporting brief, and that the demonstration of its inaccurate and misleading character would have to await a determination of the merits. This demonstration may be easily made at this time by a careful comparison of Petitioner's statement of the facts with the statements of facts as contained in both of the opinions of the Nebraska Supreme Court (R. 342-355; 376-390). We shall not, however, put the entire burden of making that comparison upon this Court, but shall point out by specific reference to the Record that each statement of fact contained in either opinion of the state Court which has been challenged by Petitioner as unsupported by the evidence or as a usurpation of the jury's function is not subject to the criticism made. In the interest of clarity and brevity, however, this can best be done in connection with the argument directed to what we perceive to be the questions actually presented to this Court by the Record.

JURISDICTION OF THIS COURT

Respondent agrees with the statements made concerning the Record, as set forth in the Petition (p. 33) under

this heading, except that any right was denied Petitioner, and of course does not question the applicability of Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (28 U. S. C. A., Section 344) to this case, in which it was stipulated that the Federal Employers' Liability Act (45 U. S. C. A., Section 51, et seq.) governed.

Solely for the benefit of this Court we feel obligated to point out that the Record fails to contain the "Judgment" of the Supreme Court of Nebraska entered July 20, 1945, as distinguished from its opinion (R. 342). The "Judgment" entered by the Supreme Court of Nebraska on March 22, 1946 (R. 376), provides that "* * * said former Judgment of this court entered herein on July 20, 1945 be, and hereby is, adhered to, and that said motion of appellee for a rehearing be, and hereby is, overruled and a rehearing herein is denied." It appears, therefore, that the judgment actually sought to be reviewed is the Judgment of July 20, 1945, which is not set forth in the Record, and not the Judgment of March 22, 1946, as stated by counsel at the outset in the Petition (pp. 1-2).

THE QUESTIONS PRESENTED

The question (or questions) actually presented is—was there substantial evidence adduced which would justify the trial Court in submitting to the jury the question of whether Respondent (defendant) was guilty of a failure to exercise ordinary care:

(a) With respect to providing and maintaining for Petitioner a reasonably safe place in which to work?

(b) With respect to a failure to warn Petitioner of the danger or likelihood of being caught and in-

jured between the side of the car and the Casein Building?

(c) With respect to the failure of the engineer to keep a proper lookout or to properly control and direct the movement at and prior to the time of the accident?

These, in substance, are the questions first presented by the Petition for the Writ (p. 35). They were likewise the questions presented to the Nebraska Supreme Court in Petitioner's (appellee's) motion for a rehearing (R. 382) and those first referred to in this Petition (p. 7) and in the argument in support thereof (p. 51). Questions numbered 2 and 3 (pp. 35-36) are merely argumentative elaborations of the questions presented in No. 1. Question No. 4 (p. 37) presents for the most part matters which necessarily inhere in the first question presented. Respondent concedes that Petitioner's negligence would not be the "sole" proximate cause of his injuries if there was negligence upon the Respondent's part which proximately contributed to causing the accident. This question as framed is likewise argumentative and does not properly reflect the basis of the determination made by the State Supreme Court that Petitioner's negligence was the sole proximate cause of the injuries which he received. The true basis for that determination is found in a consideration of Petitioner's own admissions and other wholly undisputed evidence briefly summarized in each opinion as follows:

"As already pointed out he was not required, in the performance of his service for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided. The choice of places within which to work was his own.

"The evidence of plaintiff must be accepted the effect of which is to say that he was not in fact aware of the danger. Was the danger then under the circumstances of such a character that he should have, in the exercise of reasonable care, observed it? Upon the answer to this question depends the answer to the question of whether or not the defendant was guilty of negligence, and also that of whether or not the plaintiff was guilty of negligence which was the proximate cause of the accident. (R. 352)

"He gave the signal for the movement, then not seeing the brakeman who was to give a signal for the spotting of the car he turned and walked in the direction of the movement of the car between it and the building, of necessity in very close proximity to both, and thereafter paid no attention to the fact that the car was closing in on him until he was caught.

"Reasonable regard for his own safety, especially in the light of his duties and his experience, required that he take some note of his surroundings. If after turning about he had paid any attention to his situation the accident could have been readily avoided. To a person in the exercise of reasonable and ordinary care the danger would have been obvious. (R. 355)

"Plaintiff himself testified that he made no attempt at any time to see where the car was coming or to observe the distance between the inside of the car and the side of the building. He admits that he was familiar with the fact that the car would overhang most in the center of the inside of the curve which was directly in front of him and that the narrow distance between the building and the car at the point of injury was open and apparent to him at all times. Yet plaintiff admits that he took no precautions for his own safety and made no observations or effort at any time to try to save himself from injury. (R. 384)

"It was not necessary for plaintiff at any time to see or contact fieldman Brown who then stood on the Cas-ine platform to the south. The evidence of plaintiff's witnesses is conclusive that all plaintiff needed or was required to do was cause the engineer to move backward until he, the engineer, could see and take signals from Brown. It was not necessary for plaintiff either to give or to receive any signals from Brown who did not enter the picture until the car came around the curve far enough for him to contact the engineer and by appropriate signals spot the car at the platform. Plaintiff not only could have stood on the west side of the tracks to give the signals required of him but he could have stood on the east side at any point on Myrtle Street up to the Casein building and there controlled the actions of the engineer until the engineer could see Brown and contact signals from him. The plaintiff in performing his duties was not necessarily occupying the place or position where he was at the time of the injury. It was neither customary or required that plaintiff or any other employee of defendant be there in the performance of duty. It was not a place to work, as hereinafter defined." (R. 386)

Respondent emphatically denies that Question No. 5 (p. 37) is presented by this Record. The Nebraska Supreme Court did *not* hold "in effect, that there was no negligence on the part of defendant because plaintiff was negligent and voluntarily assumed the risk," as stated by Petitioner. The first opinion (R. 342-355) did not mention "assumption of risk." It was concluded as follows:

"It follows therefore that, the plaintiff having failed to prove any of his charges of negligence, the court erred in submitting the case to a jury. It further follows that it is unnecessary to determine directly the question of whether or not plaintiff was guilty of negligence which was the proximate cause

of the accident, or to pass upon other errors assigned as grounds for reversal" (R. 355)

The "supplemental opinion," after referring specifically to Section 4 of the Federal Employers' Liability Act, as amended (45 U. S. C. A., Section 54), reads:

> "Similar cases were complicated by judicial construction before the 1939 amendment but thereafter they are comparatively simple. In other words, it has now been held that assumption of risk as a defense has been taken out of the act if defendant is negligent; that is, now the employee does not assume the risk of those dangers in his employment which are caused by or result from defendant's negligence. However, it is as important to remember that the employee still assumes the risk of those ordinary dangers in his employment which are naturally inherent in the business and not caused by or the result of defendant's negligence." (R. 380)

This is, of course, what the amended act now provides and is the correct rule and it is not otherwise contended by Petitioner. His criticism is not directed to any claimed inaccuracy in that statement of the existing rule, but rather to its mere mention in the opinion, from which it is fallaciously argued that the State Court misconceived the effect of the amendment and the controlling decisions of this Court and thereby denied a recovery. That it was mentioned at all in the "supplemental opinion" was probably due to Petitioner's insistence in his motion for rehearing (R. 358, "16.") and brief in support (R. 363-364) that the Court had misconceived the effect of the 1939 amendment to Section 4 of the Act and the decisions of this Court construing it. The "supplemental opinion" shows clearly that the contention then and now made by Petitioner is not justified and that no such question is actually presented.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

What we have said above with respect to the "Questions presented" should be considered by this Court as showing that Respondent does not approve or agree with Petitioner's assigned reasons in the form made (pp. 38-43). The reasons assigned are likewise prolix, repetitious and argumentative, and as pointed out above, the Record does not justify the claim made in "Reason V" (p. 42) that the State Supreme Court "ruled, in effect, that plaintiff assumed the risk of his injury, * * *" unless such statement is qualified by adding "when he alone was negligent and when the defendant was not negligent."

ARGUMENT

Before proceeding specifically to the argument addressed to the only questions which we believe are actually presented by the Record, it is proper to point out that Petitioner has studiously avoided mention of most of his own testimony given on cross-examination, which explained, qualified, modified, and in some instances repudiated the testimony relied upon and specifically called to this Court's attention. It is also proper to point out that Petitioner has failed to advise this Court that all of the testimony contained in this record and given by the engineer, G. J. Buzard (R. 169-203), the fieldman, J. C. Brown (R. 203-222), the Assistant Superintendent, H. B. Coburn (R. 238-242), is from the depositions of those witnesses which were taken and offered in evidence by Petitioner (plaintiff). The same is true with respect to some of the testimony of the General Yardmaster, Melbourn H. Estes (R. 222-238), although this witness later testified in behalf of Respondent concerning other matters

(R. 322-341). The testimony of these witnesses, which was offered in evidence by Petitioner, is wholly unimpeached and likewise uncontradicted, except slightly in a very few minor particulars. Petitioner, however, in an effort to persuade this Court that a question for the jury was presented, draws many unreasonable and unjustified inferences which do violence to the undisputed evidence of plaintiff himself and his own witnesses. Support for these general observations will be found in the discussion of the evidence.

It is an established rule of practice in the Courts of the State of Nebraska that "a party is ordinarily bound by the testimony of his own witnesses on the question of negligence, unless the circumstances or the evidence of other witnesses would warrant the jury in disregarding such evidence."

Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030, 1032.

Ross v. Carroll, 138 Neb. 1, 291 N. W. 726, 729.

The discussion of the evidence adduced will demonstrate that the rule and not the exception controls in this case. While this rule was not specifically referred to by the Nebraska Supreme Court in this case, its existence no doubt accounts, at least in part, for the emphasis given to the fact that the witnesses, Buzard and Brown, were Petitioner's witnesses and that their testimony, as well as the other undisputed evidence, did not permit inferences to be drawn as Petitioner contended, which were directly opposed to the facts.

It is, of course, well settled that local rules of practice and procedure having general application in the State

Courts have a like application in the suits brought in the State Courts under this Federal statute.

Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 559, 603.

Central Vermont Ry. Co. v. White, 238 U. S. 507, 511.

Minneapolis & St. L. R. R. Co. v. Bombolis, 241 U. S. 211.

Louisville & N. R. R. Co. v. Stewart, 241 U. S. 261.

Chesapeake & O. R. Co. v. DeAtley, 241 U. S. 310, 316.

Dickinson v. Stiles, 246 U. S. 631, 633.

I.

There Is No Substantial Evidence of a Negligent Failure to Provide a Reasonably Safe Place to Work.

The duty of the employer in this respect is of course to exercise ordinary and reasonable care to provide his employees with a reasonably safe place in which to discharge their duties. There are necessarily two inherent qualifications. The first is that negligence does not exist if ordinary and reasonable care is exercised by the employer. The second, which to some extent inheres in the first, is that the place must only be "reasonably safe," not absolutely safe. The duty existing is constant, but the accomplishment of its discharge expands or contracts in the light of the surrounding circumstances. This is necessarily so since reasonable and ordinary care is determined from a consideration of the surrounding conditions and "reasonable safety" is also a relative term. Furthermore, the determination of whether this duty has been discharged must be made in recognition of the right of the employer to assume that his mature and normal employees will exercise ordinary care for their own safety. In other words, the employer, whether at common law or

under the Federal Employers' Liability Act, has the right to assume that the employee will make a reasonable and proper use of his own faculties to avoid unnecessary risks of injury. The employer's duty, therefore, to exercise ordinary care in providing a reasonably safe place to work does not require him to anticipate negligence upon the part of his employees and to protect them against the effect of their own negligence. *Restatement of the Law of Torts*, Section 290, comment b, p. 778; *State of North Dakota v. Great Northern Ry. Co.* (8th Cir.), 155 Fed. (2), 1005, 1008; *Haring v. Great Northern Ry. Co.*, 137 Wis. 367, 119 N. W. 325, 328; *Morris v. Pryor*, 272 Mo. 350, 198 S. W. 817, 821; *Hogan v. New York Cent. & H. R. R. Co.* (2nd Cir.), 223 Fed. 890, 893; *Hogan v. New York Cent. & H. R. R. Co.*, 209 N. Y. 20, 102 N. E. 555; *New York, N. H. & H. R. Co. v. Dailey* (2nd Cir.), 179 Fed. 289; *Baltimore & O. R. Co. v. Newell* (3rd Cir.), 196 Fed. 866, 869; *Canadian Northern Ry. Co. v. Walker* (8th Cir.), 172 Fed. 346, 350; *Davis v. Hand* (8th Cir.), 290 Fed. 73, 78.

The employer is not an insurer of the safety of his employees while they are on duty. Liability under the Federal Employers' Liability Act is dependent upon the establishment of the employer's negligence and not merely injury. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 484. The right of the employer to assume that his employees will exercise ordinary care for their own safety when providing the place of work or while otherwise regulating his own conduct is inherent in the ascertainment of whether he has discharged the duty owing, in other words, in determining his negligence. The right to entertain this assumption therefore remains as long as negligence continues to remain the foundation of his liability. This assumption therefore is wholly different from "assumption of risk" which, as rightly understood, is a matter of de-

fensive confession and avoidance, and which prior to the 1939 amendment had the effect (except in certain cases) when established, of insulating the employer from liability even when the employer was guilty of negligence. The distinction between the two assumptions is therefore readily apparent, although the Courts were not always careful to make the distinction so long as the ultimate legal consequence was identical. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 68, 73; *Owens v. Union Pacific Railroad Co.*, 319 U. S. 715, 720.

One must also keep in mind, if confusion is to be avoided, that the employer's right to entertain the assumption here referred to is implicit in the exercise of ordinary care on his own part. Whereas the employee's failure in fact to exercise due care for his own safety does not necessarily control or affect the question of the employer's negligence and therefore may produce a wholly different legal consequence. In the first instance, the entertainment of the assumption by the employer may be sufficient under certain condition, as in this case, to establish that due care was exercised in the discharge of its duty. In the second instance given, the employee's negligence, in fact, may have no relationship to the employer's freedom from negligence, although the ultimate legal consequence may be the same in each instance or may be wholly different. Here, again, fundamental and valid distinctions in legally different concepts may be erroneously ignored if confused with the ultimate legal consequence.

It appears to us that counsel for Petitioner have failed to appreciate, or have chosen to ignore, these distinctions and hence misconceive and misinterpret the meaning and effect of those parts of the opinions of the Nebraska Supreme Court which are quoted and critically discussed on

pages 70 to 76 of Petitioner's brief. When the first opinion (R. 342-355) is read as a whole and considered with the "supplemental opinion" (R. 377-390) as intended, and particularly that part of the latter shown in the Record at pages 385-386, it is clear that the Nebraska Court was referring to Petitioner's failure to adduce any substantial evidence showing that Respondent, while discharging its duty to provide a reasonably safe place of work, was not entitled in the present situation to rely upon the assumption that due care would be exercised by its employees, and particularly Petitioner. It was that burden of proving the departure from ordinary care on Respondent's part, which the Court said Petitioner had failed to sustain (R. 355) and not Petitioner's freedom from contributory negligence in fact as stated and argued by Petitioner's counsel (pp. 75-76). Furthermore, the Nebraska Supreme Court, as distinguished from Petitioner's counsel, did not confuse "assumption of risk" in its true sense with non-negligence and did not infer, hold or decide this case, as contended by Petitioner, on the ground that he assumed any risk resulting from Respondent's negligence.

We shall not burden this Court with a complete statement of the evidence, which would appear to be unnecessary, and we shall avoid, so far as possible, repeating that part of the evidence set forth in the Petition and Brief in support which has been fairly and accurately presented. Such evidence will be referred to only when it is necessary to a better understanding or to avoid misrepresentation, distortion, false impression or confusion.

A. Physical Characteristics and Location

In general the parties agree that most of the material physical characteristics involved are accurately shown up-

on the drawing or plat identified as Exhibit 1 (R. 26A). The photostatic copy of this exhibit, which by stipulation has been reproduced in the printed Record, was, however, considerably reduced in size from the original exhibit and as so reproduced is no longer accurate with the scale shown by which the original exhibit was prepared. It is, however, relatively consistent. Petitioner's explanation of the *locus in quo*, found commencing near the middle of page 9 of the Petition and extending to the end of that paragraph, is accepted. The parties are also agreed that the photographs offered by Petitioner, which were taken in April, 1944 (R. 55), being Exhibit 2 (R. 56A), Exhibit 3 (R. 58A), and Exhibit 4 (R. 62A), and offered by Respondent, Exhibit 40 (R. 326A), Exhibit 41 (R. 328A), Exhibit 42 (R. 328B), were taken two days after the accident occurred, or on March 17, 1943 (R. 325-328). and Exhibit 11 (R. 124A), Exhibit 43 (R. 332A), and Exhibit 44 (R. 332B), were taken December 3, 1943 (R. 330-332), accurately portray (except for the sun spots in Exhibit 2 (R. 56A) that part of the premises and objects shown therein as they existed at the times the respective photographs were taken. In any event, there is no evidence to the contrary. The freight car shown in the pictures taken March 17, 1943 (Exs. 40-42), is located in the same position as when Petitioner was caught between it and the west wall of the Casein Warehouse at approximately 7:00 P. M. (Pacific War Time), March 15, 1943 (R. 199, Qs. 2289-2291; Qs. 2325-2331; R. 202; R. 218, Qs. 2484-2486; R. 232, Qs. 2637-2641; R. 325-327, Qs. 3468-3500). This car was of standard length and width for an automobile car (R. 229, 233). Cars of the same size were handled daily and were not restricted to transportation of automobiles or to use upon particular tracks or industries (R. 233-234). At the time the accident occurred, cars of the

same dimensions were in use almost as frequently in this industrial zone as were cars 40 feet in length (R. 182-183, 209). This car was in all probability empty at the time the accident occurred, although the doors on each side were then closed (R. 229, 246, 217, 232). There was absolutely no evidence from any one that the car was overloaded, out of repair or bulged, as alleged in Petitioner's initial Petition (R. 3), and the trial Court did not submit those issues to the jury in any instruction given (R. 9-17).

The tracks had been in the same location for at least ten years, although the Casein Warehouse building had been reconstructed since that time (R. 224, Q. 2535; R. 228, 240). The west or outside rail was slightly higher than the inside rail where the track was curved, as is characteristic and proper on all such tracks (R. 230, 237-238). On the day the accident occurred the track and roadbed were in apparent good condition and there were no unusual lateral or swaying movements of the car which in any manner influenced the amount of clearance between the side of the car and the building (R. 225, Q. 2559; R. 196, Qs. 2255-2256; R. 209-210). Petitioner, referring to the day the accident occurred, testified:

"1087 Q. During all the time on that day when you had been upon or around the Casein Spur track in conection with the movements going out and the car coming back in, the cars had always operated smoothly, so far as you observed?

A. That is right.

1088 Q. You didn't at any time observed any of the cars listing or pitching or lunging, or anything of that sort?

A. No." (R. 101)

There was no evidence to the contrary as respects the time or the day when the injury occurred. The testimony of the witness, Christensen, which is referred to and quoted in part on pages 28-29 of the Petition, referred to his observations made on some other occasion, the time of which was not definitely fixed, when different equipment operated by a different crew apparently following some period of heavy precipitation were observed upon a different part of the spur track near the Casein Spur switch where this witness said he was then stationed (R. 148-155). He had been in that vicinity "maybe once" before Petitioner was injured, and on three or four occasions in all (R. 154-155).

The official weather record (R. 248A) shows that during the first fifteen days of March, 1943, there was no recorded precipitation at Seattle until March 8th, when a "trace" was recorded, then none until March 12th, when there was .06 of an inch, a like amount on March 13th, a trace on March 14th and a trace on March 15th, which fell after the accident occurred (R. 247-248B). The sun set on that day at 7:14 P. M. (Pacific War Time) and visibility was good at the time the accident occurred (R. 247, 84 129, 188). None of the crew, including Petitioner, had been using his lantern (R. 134, 216-217).

A clearly legible sign reading "IMPAIRED CLEARANCE" had been continuously maintained near the northwest corner of the building and between the Casein Spur track and building for a period of many years (R. 185, 217-218, 222, 241). It was so located and legible at the time the accident occurred, and its presence was discussed by the crew shortly thereafter (R. 186, 201, 222). There is no substantial evidence to the contrary. Petitioner's testimony that he observed no such sign prior

to August, 1943, must be considered in the light of his persistent denials that he had ever been in upon the spur track before March 15, 1943, and his assertion that on the day the accident occurred he was "nowhere near it" and never looked for any such sign (R. 139-140). Under these circumstances his testimony that he did not see the sign does not tend to establish its absence and fails to achieve even the dignity of negative evidence. *Spreitler v. L. & N. Ry. Co.* (7th Cir.), 125 Fed. (2) 115, 116; *State of North Dakota v. Great Northern Ry. Co.* (8th Cir.), 155 Fed (2) 1005, 1008.

The testimony of Christensen that he did not see the sign until some time in May following the accident has no more probative effect, since he could recall only faintly at best having been there once previous to the day of the accident. His failure to observe the sign shown in the photograph taken March 17, 1943 (Ex. 40, R. 326A), prior to the latter part of May, is much more persuasive of his absence from the vicinity until that time or of faulty observation than of the absence of the sign. The testimony of Petitioner and this witness with respect to the fresh dirt about the base of the pole, the absence of grass or weeds in that particular area, the absence of rust or other indications of deterioration and the appearance of freshness of the paint on the sign and its standard, is remarkably similar in view of the fact that Christensen claimed he made these observations some three months before Petitioner states he observed the same conditions. The photographs in evidence, particularly those taken December 3, 1943, which show the lower part of the base of the pole (Ex. 11, R. 124A; Ex. 44, R. 332B), completely refute Petitioner's claim that no grass or weeds were growing about the base of the pole the preceding August, and further show that sign to be identical in

appearance and location with the sign shown in photograph taken March 17, 1943 (Ex. 40, R. 326A). But assuming *arguendo* that Petitioner's testimony and that given by Christensen with respect to the appearance of the sign when observed by them in August and May, respectively, is entirely true, it wholly fails to even indicate the absence of the sign on March 15th, or prior thereto, and tends to prove only that for some reason a new sign, or at least a new standard, was set in the same location some time between March 17th and the latter part of May, 1943.

This evidence, therefore, does not raise an issue of fact or justify the inference that the sign was not present in view of the affirmative, unimpeached and uncontradicted testimony of Petitioner's own witnesses (Buzard, Brown and Coburn) that the sign was present and clearly legible at the time Petitioner was injured. The other evidence relating to this issue given by Respondent's witnesses, Murphy (R. 308-311), Field (R. 318-319), and Estes (R. 323-324), was likewise positive, unimpeached and uncontradicted and therefore does not permit a contrary inference to be drawn, as Petitioner contends. *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 340.

Though Petitioner contended throughout the trial that he had neither seen nor had any opportunity to see the sign before he was injured, his own testimony shows that he had many opportunities to see it, as we shall later point out. However that may be, the fact that this sign, or at least a like sign, had been continuously maintained in the same location for many years is conclusively established by the wholly undisputed testimony of Petitioner's own witnesses. Its existence, therefore, must be conceded and it necessarily follows that Respondent would be jus-

tified in assuming that the information and warning proclaimed by it would be observed and heeded. The maintenance of this sign is therefore an important although not necessarily a decisive factor in establishing that Respondent did exercise ordinary care in furnishing a reasonably safe place for its employees to work while engaged in handling cars to or from the Casein plant.

B. Petitioner's Experience and Admitted Knowledge of the Conditions Creating the Danger

Counsel for Petitioner have pointed out in a general way (pp. 8-11) some of the evidence relating to this matter, which we shall not repeat. The statements there made are, however, somewhat misleading because of omissions of undisputed evidence, inaccuracies, and the failure to mention other testimony given by Petitioner himself which explained, qualified, and in some instances directly repudiated the testimony given by him on the same subjects during his direct examination. For example, Petitioner's statement omits mention of the fact that Petitioner admitted that during the time he was employed by Respondent he had been engaged in "switching operations generally throughout the industrial district where (Respondent) handles the switching" (R. 74-75, Qs. 563-566). Petitioner also admitted that before being promoted to foreman he had pretty much devoted his time in working both as fieldman and pin puller. As fieldman he, in accordance with the normal procedure, accompanied the foreman in on industrial tracks when cars were being picked up or delivered, and as pin puller would operate the switch into such tracks when using a light engine (R. 72, 73, 87-88; Qs. 534-549). He likewise admitted he was assigned to a shift that started at 2:30 P. M. when he worked under Foreman Murphy on the Myrtle Street track (among others), which serves the Casein Co. (R.

75). That every time he was on the Myrtle Street track it was for the purpose of picking up or delivering a car to the Casein Co. (R. 78-79). That he had been on the Myrtle Street tracks on three or four occasions while Murphy was his foreman during the period from July to October, 1942 (R. 117-118). That there was only one way for the engine or cars to get on to the Casein Spur track and on the previous occasions they had gone in just as they did on the day the accident occurred (R. 121-122; Qs. 1283-1291). He then testified:

"1292 Q. And when you testified that you had not been in there between the four times you were in there in the summer of 1942, and up until the day you got hurt, what were you referring to as being in there?

A. I meant that if I did go in there, the engine would have to go in that way.

1293 Q. And where did you mean by there?

A. The Casein Spur, if they went in there." (R. 122.)

He started serving as an acting foreman in the summer of 1942 and so acted with greater frequency as time went on and before he was promoted to foreman on February 4, 1943 (R. 76, 224). As foreman and acting foreman he made out industrial records identifying the cars and showing the time when they were picked up or delivered on industrial tracks (R. 76-77). These industrial records are made out by all foremen in the usual course of their duties and show the names of the helpers and starting time of the shift worked by the crew and on completion are turned in to the yard office (R. 129-131). Petitioner's Exhibit 12 (R. 132A) is the industrial sheet made by him the day the accident occurred (R. 129).

It may be observed here that this record is identical in form and purpose with the industrial sheets (Exs. 15-39) made out by Murphy when he was foreman of the switching crew of which Petitioner was a member, which was engaged in handling cars to and from the Casein plant from July 15 to October 19, 1942 (R. 249-306). Similar records (Exs. 20A, 45-47) made out by other foremen or acting foremen, showing Petitioner to be a member of the crew similarly engaged, were identified by Mr. Estes and received in evidence without objection (R. 334-338, Exs. 20A, 45-47; R. 336A-338C).

These exhibits, as reproduced in the printed Record, are not clear and in many the processes of reproduction employed have made it difficult, if not impossible, to see that on each sheet Petitioner's name appeared as a helper and the word "Casein" and the time of handling the movement there also appeared clearly upon the exhibits as originally offered. Fortunately, these facts appear in the testimony of the two witnesses (Murphy, R. 249-306; and Estes, R. 334-338), who identified these records, and counsel for Petitioner, when referring to these records (p. 31), do not contend otherwise.

Petitioner did not dispute either the accuracy or authenticity of any of these records. In fact, his own testimony concerning the making of such records by himself and other foremen supplied to a large extent the essential foundation for their admission. Briefly summarized, these records show Petitioner to have been a switchman helper with the switching crews which, during the period from July 15 to October 19, 1942, and while he was on the 2:30 P. M. shift, handled cars on 29 different occasions from or to the Casein plant. On 27 of these occasions (all except tank cars) the handling of the cars in-

volved movements on the Casein Spur track in addition to the Myrtle Street track, and all except five of the total cars handled were handled during daylight hours (R. 251-299, 335-339). Petitioner admitted that Murphy was his foreman during that period and that he probably was on the Myrtle Street track during that time (R. 118-119).

In the petition on page 31 it is stated:

> "Plaintiff, however, had testified that in working in the industrial district the full crew did not always accompany the engine into each and every industrial track."

No reference is made to the Record to support this statement and Respondent submits that it has no support in the Record. If this statement was made for the purpose of implying that Petitioner did not accompany the crews of which he was a member while they were engaged in switching cars to or from the Casein Plant, it is directly contrary to the undisputed testimony of Murphy (R. 303-304).

For reasons not clear, counsel for Petitioner have several times stressed the statement that Petitioner did not work *in* on the Casein Spur before he was injured. Surely his knowledge of the obvious physical conditions on and along that track would be the same whether he worked *in* or *out* of the track. The crew of which he was foreman at the time the accident occurred were engaged in picking up as distinguished from delivering a car (R. 33). The respotting of the car which was not to be taken away was a normal incident when picking up a car at that location, according to Murphy (R. 304-305), and not contradicted by anyone. Petitioner testified that before the accident occurred he knew every material move which would be made, because the procedure

which was to be, and in fact was, followed was the "normal way" on any similar track (R. 92).

While the industrial records prove conclusively that Petitioner had been engaged on and about the Myrtle Street and Casein tracks with much greater frequency than he was willing to admit, the State Supreme Court did not predicate its decision, even in part, upon that evidence, but resolved that issue (erroneously, in our opinion) in favor of the Petitioner (R. 351). Its decision and opinion, so far as predicated upon Petitioner's knowledge of the situation and his correlative obligation to avoid the obvious and unnecessary danger incident to working between the track and the Casein building at the point of accident, is sustained by other wholly undisputed evidence, most of it the testimony of Petitioner concerning his admitted knowledge and opportunities for observation previous to the time of, but on the day the accident occurred.

A material portion of the foundation for Petitioner's contention that he had no knowledge of the impaired clearance sign, curvature of the Casein Spur track and the close clearance which existed rests upon his testimony alone, given on direct examination, that he was riding the rear footboard of the engine at the time it came in on to the Myrtle Street track and that he alighted when the engine came to a stop at switch "E" (Petition, p. 10). Petitioner was asked to and did trace the course on Exhibit 1 (R. 26A) as from "A" to "B," which he said he followed in going to the two cars then on the Casein Spur track to ascertain which one was to be picked up (R. 35). This course, if followed, would have kept him away from the front of the Casein plant, the Casein Spur switch and the impaired clearance sign, also shown upon

this exhibit, while going to the cars. The probative effect of this testimony and the other inferences which it would justify were, however, utterly destroyed by his own admission on cross examination. He then testified:

"627 Q. Do you remember on this occasion after you left Marginal Way whether you were riding on the footboard, or were you up in the gangway of the engine?

A. No, I don't.

628 Q. Do you remember any time after you left there, some place where you were riding on the engine?

A. No.

629 Q. Do you have any distinct or definite recollection at this time at all of the place where you were riding when the engine got down here on the Myrtle Street track in front of the Casein building?

A. No, not distinctly, no.

630 Q. You wouldn't say one way or the other, whether at the time the engine got down here you were riding up in the engine, on the gangway, or whether you were riding on the footboard?

A. I imagine it would be on the footboard.

631 Q. But you don't recall?

A. No, I do not.

632 Q. Now the switch you have referred to on this plat and marked 'Switch E,' that switch was always lined for the Myrtle Street track, wasn't it?

A. I don't know.

633 Q. Do you recall whether on this occasion, as you came in, it was lined for the Myrtle Street track?

A. I don't know whether it was or not, but I imagine it was.

634 Q. Why do you say that?

A. Well, it should be.

635 Q. You don't have any recollection of the engine stopping for anybody to get out and line the switch, do you?

A. No.

636 Q. Where was the first place that you recall at all, Mr. Ellis, of the engine coming to a stop after coming in on the Myrtle Street track that afternoon?

A. I don't know when it did first come to a stop.

637 Q. Don't you recall that the engine did not come to a stop until it had proceeded east beyond the switching point?

A. No, I don't know whether it did or not.

638 Q. Of course it was necessary for the engine to come to a stop there, was it not?

A. To stop where?

639 Q. East of the Casein Spur switch?

A. Yes it was.

640 Q. Of course, if it hadn't stopped there it never could have backed into the Casein Spur; that is right, isn't it?

A. That is right.

641 Q. There wouldn't have been any purpose in bringing the engine to a stop until the engine had proceeded to the east of the switch, would there?

A. Yes.

642 Q. For what purpose?

A. To look at the cars to see if we should go any farther in after them.

643 Q. But you don't have any recollection that the engine did stop?

A. No, I couldn't say that it did." (R. 80-82.)

Accordingly it appears that Petitioner's testimony given at the trial, upon which he now relies, proved nothing—as to his alighting from the footboard or the engine stopping at switch "E". His repudiation of this testimony given on his direct examination is not merely a matter affecting credibility. Such inconsistency entirely nullifies the testimony given on direct examination and wholly destroys its probative effect. *U. S. v. Kiles* (8th Cir.), 70 Fed. (2) 880, 883; *Slacum v. Jolley,* 153 Md. 343, 138 At. 244, 248; *U. S. F. & G. Co. v. Continental Baking Co.,* 172 Md. 24, 190 At. 768, 772; *Butler v. Reed-Avery Co.,* 48 At. (2) 436, 440 (Md., 1946).

Under these circumstances the testimony given by Petitioner on the same subject in his deposition taken two months before the trial (R. 74) has special significance. He then testified that, as the engine proceeded "on the Myrtle Street track in an easterly direction, we had to go over a switch—east beyond the switch (at which time) I imagine I was on the engine, I don't remember whether I was right on it, * * * that would necessarily put (me in

a position) east and north of the Casein Spur" (R. 82). He also testified: "I don't recall which side of the spur I walked back along (to check the tags). I imagine it would be the other side of the track (the side away from the building), but I don't remember" (R. 84).

When Petitioner got back to the cars he found the tag on the side of the second car (the one at the second loading platform), on the side where he was then standing, "It would probably be on the inside" (R. 36). The tag was most likely to be on the inside of the track since the platform was on the east side (R. 90). In order to pass a hand signal to the men on the engine he had to cross to the west side of the track and go some distance west (R. 88). When the signal was given the man, "They proceeded with the engine on to the Casein Spur switch and backed in to the first car and coupled into it and into the second car and coupled it on there" (R. 36). Petitioner was working on the east side of the track and between the track and building when the couplings were made by him or Brown, and after the couplings were completed he or Brown signaled the engineer to proceed ahead off the spur while he was between the track and building (R. 89-90). Petitioner remained in that position while the engine pulled the two cars past him and proceeded "toward the east" (R. 91).

During this period of time Petitioner had every opportunity to see and must have seen the curvature of the track and its obvious location with respect to the west walls of the Casein Building. He must also have observed the two loading platforms where the cars were initially located at the time he looked to see which car was to be removed. The difference in the construction between the first and second platform, as shown upon Exhibit 1 (R.

26A), made it apparent that cars came much closer to the wall of the building at that platform and to the north of it than at the second platform, located on straight track. The car later involved in the accident was initially at the first platform and then was moved back and later forward while Petitioner was on the east side of the track in the immediate vicinity of the loading platforms. The physical dimensions of the car were obvious and the clearance between the side of the car and the building as it rounded the curve was also open and apparent and is clearly shown by Exhibits 41 and 42 (R. 328A and B). Petitioner admitted that he had an unobstructed view of the track and building after the cars pulled past him and when he walked to the north to cut off the second car, saying:

"969 Q. And when you walked out after the movement started, and the cars remained ahead of you all the time, there was nothing to prevent you then from having a full view of all of the Casein Spur track, at least from the point where the second loading platform is located, until it joins on to the Myrtle Street track, was there?

A. No.

970 Q. Now when that movement started out, the engine and the two cars, you knew at that time that it would be necessary to bring the first car behind the engine back in and re-spot it at the first door, didn't you?

A. Yes." (R. 92)

After Petitioner uncoupled the second car while on the Myrtle Street track he observed, while standing in the position which he marked "XW" on the plat (R. 26A), that the crew was ready to re-spot the first car and stated

that he walked toward the building following the course marked with a dotted line to a point "XY", where he crossed to the east side of the track at the place where the building jutted out toward the track (R. 38, 96). It is apparent from the plat (R. 26A) and also from Exhibit 44 (R. 332B) that the "Impaired Clearance" sign was readily observable from the position designated "XW" and would continue to remain in his range of vision while he walked some 30 feet toward the building and until he reached a point almost opposite the sign. The standard and back of the sign (not bearing a legend) would continue to be visible thereafter and while he was approaching and crossing the track. At that time he necessarily looked in its direction because he observed the car approaching and about 50 feet distant (R. 97).

Petitioner's testimony on direct examination, and quoted on page 9 of the Petition, respecting his claimed lack of knowledge of the clearance and curvature of the Casein Spur track was largely disproven by Petitioner himself in the course of his further testimony, as previously shown, and will be further demonstrated. Referring to his conduct and observations made and his ability to see what was open and apparent at the time he crossed the track and his further movements just preceding the accident:

"162 Q. Now then, after you crossed the Casein Spur track for the purpose of being in position to either take or give signals, do you recall whether or not you moved for some distance either to the south or north?

A. I don't recall. I moved a few feet in there, yes, toward the south.

163 Q. Why did you do that?

A. *To get a better view.*

164 Q. To get a better view of what?

A. To see if I could get a better view of Brown. *It is on a curve.*" (R. 40)

"1030 Q. Your recollection of the place where you crossed the track is that it was at the point where the building juts out about twelve inches closer to the track?

A. Yes.

1031 Q. That is the place that you selected to cross the track and to go between the track and the building?

A. That is the place I walked across.

1032 Q. Well, the choice was yours, wasn't it?

A. Yes, sir.

1033 Q. It was your selection?

A. Yes.

1034 Q. And at the time you crossed the track at that point, where was the car, the end of the car that was coming in on to the spur?

A. Well, it would be some place in between the pavement and where I was standing.

1035 Q. Well, it was fifty feet away from you, wasn't it?

A. Well, I imagine. I don't know what the distance was.

1036 Q. Well, without knowing what the distance was, don't you remember that at that time the end of

the car nearest you was out on the Myrtle Street paving?

A. Well, I couldn't say where it was, exactly.

1037 Q. Weren't you paying any attention to where the car was?

A. Yes, sir, sure.

1038 Q. Where was it?

A. It was coming back in there to be spotted.

1039 Q. How close was it to you?

A. I don't know.

1040 Q. You saw it, didn't you?

A. I was there.

1041 Q. Why can't you tell me how far away it was from you?

A. Well, how could I tell how far it was.

1042 Q. You had plenty of time to cross the track as far as the movement was concerned, didn't you?

A. Yes, I had plenty of time." (R. 96-97)

"1050 Q. After you crossed the track did you ever see Brown again?

A. No." (R. 98)

"1057 Q. After you crossed the track you didn't receive any signal from Brown?

A. No.

1058 Q. And after you crossed the track you didn't pass any signals of any kind to the engineer?

A. Not that I know of.

1059 Q. How far did you walk between the track and the building, Mr. Ellis, before you came to a stop?

A. I think it was in the neighborhood of ten feet.

1060 Q. From the point where you crossed the track where the building juts out, down to the point where you got hurt?

A. Yes.

1061 Q. When you saw the car backing in as you were approaching and crossing the track, it was moving real slow, wasn't it

A. Yes.

1062 Q. Somewhere between a mile and two miles an hour?

A. Oh, I would imagine it would be two miles or better. Three miles is as fast as a man walks slowly.

1063 Q. Well, what is your recollection as to how fast it was proceeding in on that track?

A. Well, we will say two miles.

1064 Q. It might have been slower than that?

A. Yes, it could have been slower.

1065 Q. And the next time you saw the car from the time you saw it when it was a distance of about fifty feet away from you,—the next time you saw it was when the south end of the car proceeded past you, wasn't it?

A. Yes, sir.

1066 Q. And that was while you were standing still?

A. Yes, sir.

1067 Q. And it was still moving about two miles an hour, or maybe less?

A. As far as I know." (R. 98, 99)

"1079 Q. There was nothing to prevent you from seeing just what the curvature was, was there?

A. No.

1080 Q. And of course the distance between the building and the nearest rail was at all times open and apparent to you from the time you started across the track, while you were crossing the track and while you were walking between the track and the building?

A. Yes." (R. 100, 101)

This testimony of Petitioner quoted above shows beyond any question that he did have some "knowledge" of the clearance and curvature of the Casein Spur track. His own testimony also affirmatively discloses that he knew, as the result of his previous railroad experience and prior to being injured, that a railroad car would overhang the rail the most at its center on the inside of a curve (R. 100, Q. 1076), this apparently being a matter of common knowledge to switchmen "working on the ground" (R. 209, Q. 2397). That Petitioner also knew that he was standing on the inside of the curve at its apex is also affirmatively shown by his own testimony quoted on page 85 of Petitioner's brief. The comments of counsel following this quoted testimony are not only unfair to this Court and to the Supreme Court of Nebraska, but are also without substantial support in the record. It was not "on the basis of the quoted testimony," as stated, that the State Supreme Court "adopted an inference." The only statement contained in either opinion which affords any

possible semblance of justification for this charge made by counsel is the statement previously quoted on page 5 herein (R. 384), and particularly that portion reading:

> "* * * the inside of the curve which was directly in front of him and that the narrow distance between the building and the car * * * was open and apparent to him at all times."

The basis for this statement is obviously not limited to the "quoted testimony," as asserted by counsel, but finds support in the other admissions made by Petitioner, part of which we have previously set forth, and the rest of which will be directed to this Court's attention in connection with Petitioner's other testimony, which established his negligence as a matter of law to be the sole proximate cause of his injuries.

Petitioner at no time testified that the testimony given in his deposition, which is quoted on page 85 of Petitioner's brief, was in any way or in any degree erroneous, nor did *he testify*, as now argued by his counsel, that this testimony, as distinguished from other testimony which concerned other matters, was induced by any observation made after the accident and before his deposition was taken.

C. Petitioner Was Not Required to Work Where the Danger Existed and There Was No Necessity For His Presence There

The plat (R. 26A) shows that no obstructions existed along the west side of the Casein Spur track at any point which affected adequate clearance on that side of the track. There was no evidence that any temporary condition existed on the west side of the track which would interfere

in any way with the members of the crew working on that side in perfect safety to all concerned. There was no evidence from Petitioner or any other witness that he was "required" to work upon the side next to the building where it was obvious that close clearance existed, and certainly no evidence that he was "required" or even justified in assuming the position he occupied when the accident occurred. The most that can be said which finds support in the evidence is that Petitioner crossed the track to be on the engineer's side, as he says, to receive signals from Brown, who was "supposed" to be at the first loading platform to relay those signals to the engineer (R. 39, 40). That it was customary under ordinary conditions to give signals from the engineer's side of a track and such custom also prevailed on the Casein Spur track, but Petitioner, who repeatedly denied that he had ever been on or along that spur prior to the day of the accident, does not claim to have had knowledge or to have relied upon any custom as respects the manner of working on that particular track. This evidence might support an inference of "permission" if the presence of the warning sign is disregarded, but it fails to afford any reasonable basis for inferring necessity or requirement and other undisputed testimony of Petitioner and his own witnesses does not permit an inference of necessity or requirement.

Petitioner admitted that signals to control the movement incident to re-spotting the car could have been given from the fireman's side (West side) of the track merely by notifying the engine crew that they would be so given, as he had previously done and knew that to be the proper practice whenever it would be dangerous to assume a position on the engineer's side of any track where he might have occasion to work (R. 102-103). Petitioner had also

testified that it was his "duty to be in a position to be able to give or take a signal from Mr. Brown" (R. 40). When he crossed to the east side of the track (for that purpose) he discovered immediately that he was not in a position either to give or to receive from Brown any signal, because the construction of the building prevented him from seeing Brown, and Petitioner received no signal (R. 98). Brown likewise could not see Petitioner, although Brown was at the first loading platform where he was "supposed" to be (R. 206). At the time Petitioner crossed to the east side of the track the car coming in on the spur was about 50 feet away, moving at a speed of two miles per hour or less (R. 97-99). Petitioner therefore had ample opportunity to observe that he was not in a position to receive or transmit signals to Brown and to recross the track to the west side ahead of the car, where he would have been in a position to see Brown and discharge the duty he claimed to have. Instead he walked about 9 feet south between the track and the building and came to a stop short of a position where he could see Brown (R. 40, 98). Thereafter the front end of the car passed him, still traveling at the same low speed, but he made no effort to see where the side of the car was with reference to the wall of the building he was against (R. 99, 100). Petitioner's witness, Buzard, testified without contradiction that it was not necessary for signals to be relayed or for Petitioner to be between the track and the building for the purpose of spotting the car (R. 181). It is true that if Petitioner had moved out of the range of vision of the engineer the latter would have brought the movement to a stop immediately (R. 191). Therefore if Petitioner had paid the slightest attention to the car even after the front end had reached and passed him and walked along beside it, as he admittedly could have done with absolute

safety (R. 99), he could easily have avoided the injury. If by so doing the movement would have come to a stop, that would also have made it certain that the accident would never have occurred. The few seconds delay that might have resulted from stopping the car and until Petitioner could take a safe position on the west side of the track or even on the east side away from the apex of the curve where he could contact either the fireman or engineer by signal would have been of no consequence. Surely Petitioner and his counsel do not expect this Court to justify Petitioner's conduct upon the ground that the movement should not have been stopped—even temporarily.

Petitioner's witness, Brown, also testified that it was not necessary in re-spotting the car to relay signals to the engineer through Petitioner (R. 206-207, Q. 2375). Brown had gone to the first platform for the purpose of giving such signals to "the engineer or fireman" (R. 206). He was on the east side of the track because he saw Petitioner on the engineer's side while Petitioner was standing on Myrtle Street as Brown, after lining the switch, walked in on the spur and received no instructions from Petitioner to work on the west side (R. 204-205, 207). There was only one car coupled to the tender of the engine and by the time it would be necessary to give signals to spot the car the engine would be sufficiently around the curve so the engineer would be able to see Brown (R. 207). No other evidence was adduced which would show or tend to show that Petitioner was "required" or even authorized to work between the track and building at the place he was injured under the conditions existing. If, as counsel for Petitioner state (p. 54),

> "* * * it was important and necessary that petitioner, the engineer, and switch helper Brown coor-

> dinate their work and efforts so that the work in hand hight be efficiently and safely carried out.",

a statement not warranted by the evidence, it is certain that Petitioner assumed a position which absolutely precluded any such coordinated action.

It was in recognition of the undisputed evidence stated above that the Nebraska Supreme Court said:

> "The plaintiff in performing his duties was not necessarily occupying the place or position where he was at the time of the injury. It was neither customary nor required that plaintiff or any other employee of defendant be there in the performance of duty. It was not a place to work, as hereinafter defined." (R. 386)

Counsel for Petitioner, at pages 68 and 95 of Petitioner's brief, quote only the last two sentences of the three quoted above. This apparently was done intentionally in a way calculated to lend apparent support to the unjustified charge that the State Court "* * * made a complete turn about in its second opinion * * *." It is obvious that all three of these sentences must be considered together as obviously intended and that the word "there" used in the second sentence and "It" used in the last refer to the "place or position where he was at the time of the injury," as stated in the first sentence. Unfairness of this kind, both to this Court and the Nebraska Court is, in our opinion, a tacit concession of the lack of merit in this Petition.

Further proof of the same disposition to unfairness is found in the argument made on pages 77 and 78 of Petitioner's brief concerning the correction made in the supplemental opinion (R. 377-383) of an obvious error

through the inadvertant omission of the qualifying words which were added a few days later at the Court's own direction. The Record (R. 386) does not justify the insinuations made and any lawyer who is familiar with the various reporting services, which provide rapid distribution of the opinions of this Court and other Courts, knows that similar corrections to supply inadvertent omission or to correct obvious error are frequently made by any Court. Petitioner does not contend that any other change was made in the supplemental opinion after it was first published and the same qualification was originally made in several other places in the supplemental opinion (R. 384-386) as well as in the first opinion (R. 351-352), which definitely shows that the Nebraska Supreme Court was not confused as to the facts, as further contended by Petitioner (p. 94).

Apparently in further effort to persuade this Court that something unclean or dishonest should be inferred from the fact that this minor correction was made, counsel for Petitioner, at the top of page 78 of Petitioner's brief, erroneously state:

> "The engineer, in fact, had testified that until after Ellis was injured he had never * * * known of employees working on the other side of the track, * * *."

The apparent support for this statement is the fragmentary portion of the testimony of this witness quoted first on page 18 of the Petition and repeated again on page 94 of the brief. To achieve the desired end the Petition and brief studiously avoid quotation or mention of the questions and answers of this witness immediately following the first answer quoted. These are:

"2258 Q. So that according to your observations Mr. Ellis was working on the proper, at least the customary side?

A. Well, it is optional. Whoever is on the ground, they can work on either side, as far as that goes. It does not make any difference which side they work on.

2259 Q. But in going inside on the Casein Spur you never saw any one work on any other side in doing the work he did?

A. Yes, that is, speaking for myself. All of the other fellow say they work on both sides. Oh, previous to the accident I can't recall of any time working on the fireman's side." (R. 196)

Another misstatement of the Record concerning the testimony of this witness, which was offered by Petitioner, appears on page 20 of the Petition, where it is said:

"* * * he could not recall any other track that was as close to a building or fixed structure as was the Casein Spur."

We again quote from the Record:

"2058 Q. Well, do you recall of any track in or about the Argo yards that is curved and located as close to a building as the Casein Spur is located to the Casein Building?

A. Yes, several of them.

2059 Q. And where are those?

A. Well, there is one at the local yard at our freight depot and there is one on King County lead, and one of our industries, that is, the Federal Pipe, and I believe now that Pacific Huts has got one that is on a curve that is practically as close, and I know at Boeings

they have them and all our stock yards." (R. 177)

Considering the testimony which preceded this, along with the testimony quoted above, it is quite apparent that this witness was for a time confused by the form of the questions asked and when inquiry concerning the same subject was made in more understandable form he encountered no difficulty in making direct, frank and responsive answers. Similar testimony to that quoted above was given by Mr. Estes, who added that the amount of clearance on such industrial tracks is dependent, in part, on the requirements of the particular industry served (R. 233).

Petitioner had been engaged in working on the tracks serving the Boeing plant since he was promoted to engine foreman (R. 63) and had just come from there the day he was injured (R. 33).

In the light of the undisputed evidence, Petitioner's contention that Respondent negligently failed to provide a reasonably safe place to work cannot be upheld. The evidence conclusively establishes that the place (the Casein Spur track) was a reasonably safe place to work. There was only a short space along the side of the building on the inside of the apex of the curve where clearance was impaired. Proper warning of "Impaired Clearance" was given by the maintenance of the sign. Even in its absence, this danger would be obvious to an employee making any reasonable use of his own faculties, and Respondent had the right to expect and assume that its employees, and particularly Petitioner, would make such use. It was neither necessary nor proper for Petitioner to cross to the inside of the curved track where it was obvious that the building jutted out closer to the track and which neces-

sarily reduced the clearance. His decision to remain between the track and the building after he knew that he was precluded from discharging the duty he claimed to have undertaken was wholly inexcusable. It was his failure to exercise any care thereafter for his own safety which resulted in his injury, and not because of a negligent failure on Respondent's part to provide a reasonably safe place for him to work. The Respondent's duty in this respect has never required the employer to make or keep all places where his employees may go but are not required or reasonably expected to go to perform the work reasonably safe. Such a rule would, in its practical operation, render the employer an insurer of the safety of whatever part of his or a third person's premises an employee might choose to use in the performance of his duties, even though it be obviously unnecessary and dangerous; as in this case. Furthermore, negligence in this situation cannot be predicated merely upon the short space necessarily existing between an industry track and the side of a building where loading facilities are maintained.

Tuttle v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 194-195.

Reese v. Philadelphia & Reading Co., 239 U. S. 463, 465.

Toledo, St. L. & W. R. R. Co. v. Allen, 276 U. S. 165, 170.

Delaware, L. & W. R. Co. v. Koske, 279 U. S. 7, 10-11.

Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, 403.

Davis v. Hand (8th Cir.), 290 Fed. 73, 78.

Haring v. Great Northern Ry. Co., 137 Wis. 367, 119 N. W. 325, 328.

Canadian Northern Ry. Co. v. Walker (8th Cir.), 172 Fed. 346, 350.

Baltimore & O. R. Co. v. Newell (3rd Cir.), 196 Fed. 866, 869.

Hogan v. New York Cent. & H. R. R. Co. (2nd Cir.), 223 Fed. 890, 893.

Hogan v. New York Cent. & H. R. R. Co., 209 N. Y. 20, 102 N. E. 555.

McCann v. M. & St. L. R. Co., 159 Minn. 70, 198 N. W. 300, 301.

Stone v. Chicago & N. W. Ry. Co., 176 Minn. 104, 222 N. W. 641, 642.

II.

There Is No Substantial Evidence of a Negligent Failure to Warn Petitioner of the Close Clearance Existing at the Point of Accident.

Petitioner at the time this accident occurred was the foreman of the switching crew (R. 31). As such, he had supervision over the helper switchmen, as well as the engineer and fireman. Each of those persons was subject to his orders and the movements made were made under his directions (R. 73). The engineer, Buzard, and the fieldman, Brown, had each worked with Petitioner on previous occasions (R. 170, 203-204). Field, the pin-puller, who remained on the Myrtle Street track near the switch (R. 314), had previously seen Petitioner around the yards, knew that he had been a foreman for some time (R. 321). Each of these persons, therefore, knew that Petitioner was an experienced switchman. They also knew that the sign bearing the legend "Impaired Clearance" was present and had been continuously so located ever since each of them had been assigned to work in that immediate vicinity (Buzard, R. 185; Brown, R. 217-218; Field, R. 318-319). The engineer and Mr. Brown also knew that Petitioner had gone in along the spur track just a few minutes before

when the check was made to see which car was to be taken away and when the engine was ordered in, the couplings made and the two cars taken out. Field undoubtedly had the same knowledge, although this does not appear one way or the other in the testimony. Each of these witnesses had observed Petitioner on the east side of the track near the corner of the building where the sign was located only a minute or so before the accident occurred (Brown, R. 205, 207; Buzard, R. 191, 201-202; Field, R. 315). Petitioner admitted in the statement given to Mr. Estes, over his own signature (R. 117), that he had necessarily been in the same position (Ex. 10, R. 333). As previously stated, the testimony of Buzard and Brown was by deposition taken and offered in evidence by Petitioner. Each of these persons was therefore justified in believing that Petitioner had been advised of impaired clearance, not only by the legend on the sign, but by the open physical conditions obvious to one on the grounds between the track and building at the point of accident. This is particularly true since Petitioner neither testified nor now claims that he advised any member of his crew of his claimed unfamiliarity with the conditions there existing or that he ever requested or sought the advice of anyone as to the proper, safe or customary methods previously employed on that track. Under these conditions it would have been presumptuous impertinence on the part of his subordinates to have suggested to Petitioner the way in which he should conduct the work in his charge when none of them knew that he would place himself in a situation of peril and thereafter fail to exercise any precaution for his own safety.

It is apparently Petitioner's contention that some specific and express warning of the impaired clearance exist-

ing at the point of accident should have been given him by one of his superiors before or at least at the time that he was given the instructions to pick up the car at the Casein plant (pp. 84-85). This contention is likewise made in utter disregard of the undisputed evidence which conclusively establishes that Respondent had provided a constant and continuing warning by its erection and maintenance of the sign, and also that the curvature and location of the track with respect to the Casein Building was open and apparent.

The duty to exercise ordinary care with respect to warning applies only to hidden or latent dangers known to one owing the duty and which are not readily discoverable by the exercise of ordinary care and diligence on the part of the one to whom the duty may otherwise be owing. In this situation, as in all others where ordinary care is the measure of the duty, its discharge is justifiably accomplished upon the assumption that a mature employee in full possession of his faculties will, in the absence of notice to the contrary, exercise ordinary care for his own safety.

Missouri Pacific R. Co. v. Aeby, 275 U. S. 426, 430.

National Biscuit Co. v. Nolan (8th Cir.), 138 Fed. 6, 12.

Grand-Morgan Theatre Co. v. Kearney (8th Cir.), 40 Fed. (2) 235, 237.

New York Central R. Co. v. Boulden (7th Cir.), 63 Fed. (2) 917, 919.

State of North Dakota v. Great Northern Ry. Co. (8th (Cir.), 155 Fed. (2) 1005, 1008.

Certainly those superior in position to Petitioner would not be required to anticipate that he would so regu-

late his own movements or observations in connection with the work to be done at the Casein plant that he would fail to see or heed the warning sign or obvious lack of clearance on the inside of the curve or that he would carelessly assume a position of obvious peril and make no effort to protect himself from a danger readily discoverable and permit the center of a car passing him at a slow rate of speed to squeeze him against the building in broad daylight. Such anticipation would require clairvoyant powers far beyond the ability of the reasonably prudent person similarly situated, which is the legal standard. "Ordinary care has reference to the probabilities of danger rather than the possibilities of peril." *State of North Dakota v. Great Northern Ry. Co.*, 155 Fed. (2) 1005, 1008. "Bare possibility is not sufficient." *Brady v. Southern Ry. Co.*, 320 U. S. 476, 483.

Petitioner argues that the testimony of Brown. quoted in the Petition on pages 31-32, which relates to warning given by members of the crew to known newcomers in consequence of Petitioner's injury, "persuasively shows that defendant had knowledge of the danger * * *." Of course, defendant, following this accident, knew that Petitioner had been injured and the manner in which it occurred. It certainly does not follow from this, however, that it ever occurred to any one, before Petitioner was injured, that any warning other than that then provided should be given. The "persuasive" quality of that testimony as urged by counsel is the same as the kind of persuasion which would be required on the part of an insurance salesman who would offer to sell retroactive policies of windstorm insurance to those who had owned property in the tornado's path.

III.

There Is No Substantial Evidence of Negligence on the Part of the Engineer and the Undisputed Evidence Affirmatively Establishes the Absence of Negligence on His Part.

In referring to the evidence bearing directly on this matter and more particularly the testimony of the engineer (Buzard), counsel for Petitioner have again presented a distorted picture. This has been accomplished in this instance as in the others by omitting the mention of much of his testimony, by making statements directly contrary to or unsupported by the evidence when considered as a whole, and by drawing unjustified inferences which do violence to the undisputed testimony of this witness which, in many important particulars, is corroborated by the testimony of all other witnesses and by undisputed physical facts. Respondent also invites this Court to review and consider all of the testimony given by the engineer (R. 169-203) along with the other undisputed evidence. We will not repeat his testimony to the extent that counsel for Petitioner have fairly or accurately set forth or commented upon it, nor shall we repeat at this point his testimony which we have previously referred to herein.

Though Buzard had been engaged from time to time over a period of 18 years as a fireman or engineer (the latter for 3 years) upon locomotives handling cars on this track previous to the accident, he had always remained in the locomotive cab on each previous occasion and had never been on the ground in the vicinity of this track before the accident occurred (R. 169, 183; Qs. 2128-2129; R. 193, Q. 2237). Accordingly he did not get back along the track a sufficient distance to observe the physical characteristics of the loading platforms along the west wall and thought

that there were only two platforms (R. 172). From his position in the cab at the rear of the engine it had always previously appeared that there was ample space between the cab and the wall of the Casein building, because the cab did not overhang the inside rail while rounding the curve to the same extent as did the cars or engines at their center (R. 183-184, Qs. 2128-2134). Except for the "Impaired Clearance" sign he would not have known that there was less than standard clearance between the track and building (R. 185, Q. 2142; R. 190, Q. 2204; R. 194, Qs. 2239-2242). The sign had not meant a great deal to him because he had no previous occasion to be outside the cab as did switchmen (R. 185, Q. 2143). He last saw the sign two or three days before his deposition was taken. It did not appear new to him then and looked like all such signs (R. 185-186). Just before the accident occurred he was backing in on the spur at a speed of *one* to *two* miles per hour and the car was coupled to the locomotive tender (R. 188, 195, 180, 189). He was therefore from 30 to 35 feet from the rear of the tender (R. 189, Q. 2189). The engine was headed east at the time the movement started and he was on the south side of the engine (R. 180, Qs. 2089-2091). He saw Petitioner near the corner of the Casein building as the movement got under way and watched Petitioner continuously thereafter for signals (R. 181, Qs. 2095-2101; R. 182, Qs. 2105-2108). Before the occurrence of this accident nothing had ever occurred in his experience to cause him to realize that the center of a car would come so close to the side of this building while rounding the curve (R. 189-190, Qs. 2192-2202).

Petitioner argues (pp. 21, 92) that the engineer, if alert and attentive, must have seen the side of the car converging towards Petitioner and must, or at least should

have seen that Petitioner was in a position of peril. This argument is made not only in the face of the unimpeached testimony of this witness to the contrary but also in utter disregard of the physical facts, as shall be shown. The point of the accident is shown on Exhibit 1 (R. 26A) to be a little less than 10 feet south of the point where the building juts out about 12 inches closer to the track. From this point the wall of the building extends for a distance of approximately 28 feet in a northeasterly direction to the northwest corner of the building. At the time the accident occurred, at least half of the car was to the northeast of Petitioner. The north end of the car, therefore, was a distance of approximately 15 feet to the northeast of the jutting extension. The tender of the locomotive being 30 to 35 feet in length also intervened, which placed the engineer a distance of some 50 feet from the jutted extension, making allowance for space between the ends of the engine, tender and car. At the time of the accident, therefore, the engineer was in the cab approximately 60 feet northeast of Petitioner and in a position just above the south edge of the Myrtle Street pavement. This is in effect his undisputed testimony (R. 202, Qs. 2326-2332). The engine was, therefore, still headed in a general easterly direction and when he moved a short distance "ahead" to free Petitioner he moved to the "east" (R. 197, Qs. 2273-2275). The photograph (Ex. 43, R. 332A) was taken with the camera located at the south edge of the Myrtle Street pavement and 18 inches to the east or left of the inside rail. Mr. Estes, shown in the picture, was then standing with his back against the indentations in the side of the building in the position which Petitioner was standing at the time of the accident (R. 330-331). Except for the fact that the camera was four or five feet above the ground and the eye level of the engineer would be con-

siderably higher (which, however, is immaterial), this picture shows substantially the view that the engineer had of Petitioner at and immediately previous to the time of the accident. The car shown in this photograph is a different car then located at the first platform (R. 331). This is the only photograph contained in the Record and taken from a position which would reflect the view of the engineer. From this photograph, the plat, and his testimony it indisputably appears that he could not see the side of the car "creep up" on the wall of the building, because the building was not on a uniform curve, but "is chipped off into diagonals and I was looking off across this first thirty feet diagonal, * * *" (R. 192, Q. 2220). Continuing, he testified:

"2221 Q. Did you see Mr. Ellis get caught and crushed between the side of the car and the building?

A. No, I did not see that at all. All I saw was, as I say, I saw his right foot twisted on the ground and then I stopped.

2222 Q. Well, you could see his body, too, could you not?

A. No, in order to see just exactly what he was up against I had to get back inside of the cab and look out the back window and I see he was pinched after it was all over with. He was standing partially,—I could see his back and of course his left leg and left side was away from me and I could not see that." (R. 192)

Further undisputed proof showing how the construction of the building interfered with the view which the engineer had is found in testimony of Brown that from his position immediately south of Petitioner (after the accident and when he had gone to investigate the reason

for the stopping of the movement) he could *not* see the engineer and was therefore required to call out instructions (R. 212-213, Qs. 2429-2431). This testimony is misstated on page 17 of the Petition so that the opposite impression might be obtained. In view of counsel's unjustified assertions that the engineer could see the wall at Petitioner's back or any part of the wall beyond the point where the building jutted out (p. 25), we quote from the record:

"2234 Q. You could see the side of the building?

A. Where he was standing?

2235 Q. You could see the wall of the building?

A. Where he was standing?

2236 Q. Yes.

A. No, no, I could not because I was around this little jog in the building and I could not see that part of the building at all." (R. 193)

The first indication of danger to Petitioner which the engineer could or did see was when he saw Petitioner's "right foot twisted on the ground and I stopped right there * * *" (R. 191, Q. 2211). The evidence is undisputed that the engineer acted with such extraordinary care, vigilance and skill that he stopped the movement, as conceded by Petitioner, "almost instantly" (p. 79) and within a distance of 12 or 14 inches (R. 195) from the time the car started to squeeze Petitioner (R. 214-215, Qs. 2447-2452).

Respondent submits that in view of this positive, undisputed, unimpeached and corroborated testimony no inference can be reasonably adduced by any fair-minded

person to the effect that the engineer knew or should have known that the Petitioner was in a position of peril or oblivious to his own situation prior to the time that his foot was observed to be turning. Such inferences as counsel for Petitioner now assert cannot exist in the face of such affirmative evidence that the facts sought to be inferred did not, in fact, exist. *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, 340, and authorities cited.

The fact that Petitioner himself, notwithstanding the natural inclination of all persons to attribute misfortune to the conduct of others, had no criticism to make and attached no blame or fault to the engineer for a period of almost a year following the date of the accident is highly significant (R. 103, Qs. 1109-1110). That Petitioner changed his mind and was more critical of the engineer at the time of trial (two months later) is not unusual, but it was wholly unjustified (R. 103, Qs. 1107-1108). Petitioner had always known that the engineer was watching him and had so testified himself (R. 39, Q. 154). He must also have known long before his or the engineer's depositions were taken that the movement was stopped almost instantly and that he owed his life to the care, diligence and skill which that entailed, because he had always known that the car was moving at a speed of two miles per hour or less (R. 99, Qs. 1062-1067), as well as his position at the time of the accident (R. 57) and immediately following (R. 41-42).

IV.

Petitioner's Negligence Is Established by His Own Testimony to Be the Sole Proximate Cause of the Accident.

In discussing the evidence concerning this matter, we cannot entirely avoid making some repetition. The portions of the evidence previously directed to the attention

of this Court will, however, be summarized as briefly as possible, such as Petitioner's own testimony that he had on at least three or four previous occasions been a member of the crew which handled cars to the Casein plant in the summer or fall preceding the accident. That on the day the accident occurred, he had been between the track and the building in the vicinity of the first two loading platforms on at least two separate occasions before he was injured. That no artificial light was required or used and hand signals were employed. There were no obstructions to his view of the track as the two cars were taken off the spur and that he did observe the curvature of the track at that time and shortly before. That he knew that the first car out was to be re-spotted at the first loading platform. The fact that as he crossed to the east side just after the movement got under way he had ample time in view of the slow rate of speed of the movement and the distance intervening. His discovery that he could not see Brown, and his walking south for a distance of nine feet between the track and building and then stopping at that point. His knowledge, as the result of his previous experience, that signals could and should be given from the fireman's side of the track if it would be dangerous to pass them from the engineer's side and his knowledge that it was characteristic of all cars to overhang the inside rail the most at their center when at the apex of a curve. That he was standing at the place where the greatest likelihood of that occurrence existed.

Petitioner did not trip or stumble over any object and "got hurt * * * only because (he) got into a place that was simply too close for (him)" (R. 103, Qs. 1105-1107). After observing the car proceeding towards him when at a distance of about 50 feet and knowing it would

have to be moved past the point he would be occupying, he had turned his back upon it and made no further observation of the car until the south end moved past him, which was after he had come to a stop (R. 99, Qs. 1065-1066). From his position nothing could or did obstruct his view, both of the side of the car and the side of that portion of the wall of the building he had his back against (Ex. 3, R. 92A). He admittedly made no "attempt at all to see where the car was coming, or the distance between the inside of the car and the side of the building * * *." (R. 100, Qs. 1074-1075.) He then testified:

"1079 Q. There was nothing to prevent you from seeing just what the curvature was, was there?

A. No.

1080 Q. And of course the distance between the building and the nearest rail was at all times open and apparent to you from the time you started across the track, while you were crossing the track and while you were walking between the track and the building?

A. Yes.

1081 Q. You didn't take any precautions for your own safety at all after you crossed to the east side of the track, did you, Mr. Ellis?

A. There wasn't any precaution to take.

1082 Q. Well, you didn't take any precaution or make any observation for your own safety at all?

A. Assuming it was a safe place to work, there wasn't any reason for taking any precaution.

1083 Q. Did you take any?

A. No.

1084 Q. Did you make any observation, make use of your own eyes, for the purpose of trying to protect yourself and save yourself from harm?

A. What do you mean by that?

1085 Q. Well, did you make any observation in an effort to try to save yourself from injury?

A. What kind of an injury?

1086 Q. (Read by reporter) Did you make any observation in an effort to try to save yourself from injury?

A. No." (R. 100-101)

His counsel, on page 55 of Petitioner's brief, laboriously argue that it would require a knowledge of trigonometry and the possession of complicated measuring instruments on Petitioner's part to have been "able to figure out what would happen if he remained in the position he was in * * *." Petitioner was possessed with the only instruments required to avoid this accident—his eyes—and if he had made any effort to use them the accident could and would have been easily prevented. He admitted that even as the end of the car reached him he could have walked along the side of the car near the front end all the way to the first loading platform without being injured (R. 99, Qs. 1069-1070). Had he walked only a distance of a few feet it would also have avoided the accident. The injury could also have been readily avoided if he had given the slightest signal of danger to the engineer who had the movement under perfect control. But Petitioner admitted that he gave no signal to the engineer at any time after he crossed to the engineer's side of the track (R. 98, Q. 1058).

His attorneys at the trial, before the State Supreme Court and now before this Court make a valiant effort to justify or at least excuse Petitioner's utter lack of care for his own safety by arguing from Petitioner's self-serving testimony, which first appeared in his redirect examination (R. 134), that he was engrossed in his work. The facts, however, indisputably show that this accident occurred in the course of a routine unhurried switching movement which involved the re-spotting of an ordinary car to be handled in the "normal way." In view of the admitted speed of the movement the accident did not occur until after some 28 seconds had elapsed after Petitioner crossed the track, and some 8 seconds or more after Petitioner had abandoned his idea of making contact with Brown. This upon the assumption that he crossed the track at "XY", that about half of the car had proceeded past him before he was caught and that the car was traveling at a speed of 3 feet per second. During that time Petitioner had adequate opportunity and certainly had the duty to make some observation for his own protection and if he had made any, this accident would have been prevented. If, therefore, the danger of being caught can be said to have been "hidden" from Petitioner, it was simply because he closed his eyes to that danger.

Authorities Relied Upon by the Petitioner

We shall not burden this Court with a detailed discussion of these cases and the facts involved which distinguish them from this case. To the extent that these cases relate to injuries occasioned through insufficient clearance, they involve employees who were riding upon the top or sides of moving cars or engines where such employees were required to be under the conditions existing in the discharge of their duties. Most of the cases

also involved accidents which occurred at night or under atmospheric or other unusual conditions which precluded the employee from making any observation to protect himself from injury. In none of these cases was there any proof that the employer had maintained a warning sign or that the particular employee concerned had any opportunity to gain knowledge of the dangerous situation. The distinguishing facts in most of these cases are clearly pointed out in the "supplemental opinion" (R. 388-390) and in the original opinion (R. 354-355) of the Nebraska Supreme Court. The same distinctions have previously been made in other cases which more nearly resemble the facts in the present case:

New York, N. H. & H. R. Co. v. Dailey (2nd Cir.), 179 Fed. 289, 291.

Baltimore & O. R. Co. v. Newell (3rd Cir.), 196 Fed. 866, 870.

Hogan v. New York Central & H. R. R. Co. (2nd Cir.), 223 Fed. 890, 895.

McCann v. M. & St. L. R. Co., 159 Minn. 70, 198 N. W. 300, 302.

Davis v. Hand (8th Cir.), 290 Fed. 73, 78.

The case of *Hemmingsen v. Chicago & N. W. R. Co.*, 134 Wis. 412, 114 N. W. 785, discussed in Petitioner's brief (pp. 88-89), was urged upon the Supreme Court of Wisconsin as being controlling at the time that Court was considering the case of *Haring v. Great Northern R. Co.*, 137 Wis. 367, 119 N. W. 325, but the Wisconsin Court did not follow it in the latter case (p. 327) because it was clearly distinguishable upon the facts as there pointed out.

The case of *New York, C. & St. L. R. Co. v. Boulden* (7th Cir.), 63 Fed. (2d) 917, cited on page 90 of Petition-

er's brief, does not, as indicated by the excerpt quoted, involve any question of clearance. The post referred to projected above the surface of the station platform so as to render the surface of the platform defective and the employee was caused to stumble by reason of that defect while alighting from the train.

The case of *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, briefly discussed on pages 57-58 of Petitioner's brief, involved a state of facts which bears no resemblance to the instant case. If Bailey in that case had been the man in charge of the work to be done, as Petitioner was in this case, and had directed that the car be moved on to the bridge when "the car could have been opened or unloaded near the bridge on level ground, * * *" and then assumed a position of obvious danger to do the work, the case would bear more resemblance to the facts in the instant case.

The case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, from which an excerpt is quoted on page 97 of Petitioner's brief, is likewise readily distinguishable. It should first be observed that the Tiller case does not purport to modify or overrule a long line of Federal decisions to the effect that negligence cannot be predicated merely upon insufficient clearance. The case of *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, is not criticized as respects the part of the opinion in that case which relates to the clearance features. The liability in the *Tiller* case, supra, was determined from a finding that the employer was negligent in backing cars on a track adjacent to the track upon which the cars were located which were being inspected by Tiller. The night was dark; Tiller had no knowledge of the cars approaching on the adjacent track and no light was visible from Tiller's position. It also

appears from the later decisions in this case (142 Fed. (2) 718, 323 U. S. 574, 577) that the defendant was engaged in making an unusual switching movement and by its failure to have a light on the tender while so engaged it violated a safety regulation promulgated by the Interstate Commerce Commission, which, if complied with, may have served to warn Tiller of the approaching movement. The case contains no intimation that the amendment of August 11, 1939, to Section 4 of the Federal Employers' Liability Act imposed any additional duty upon the part of the employer as respects the location or spacing of its tracks with reference to each other or to fixed objects adjacent thereto.

The cases of *Owens v. Union Pacific R. Co.*, 319 U. S. 750, and *Tennant v. Peoria & U. P. R. Co.*, 321 U. S. 29, likewise bear no resemblance to the facts in this case aside from the fact that the injuries arose in consequence of switching movements. In the first case it appeared that neither the Circuit Court of Appeals nor this Court gave consideration to the sufficiency of the evidence to establish defendant's negligence, since the Circuit Court of Appeals had decided the case solely upon the ground that the employee had, as a matter of law, assumed the risk of negligence of a fellow servant. In that case there was no certainty, as in this case, that the injured employee knew that the movement was under way or would be started, and the negligence relied upon was the failure to ring the bell in accordance with an operating rule which the Petitioner in that case contended was applicable. After the case was remanded to the Circuit Court of Appeals by this Court, the former gave consideration to the question of defendant's negligence and again reversed the judgment of the trial Court (142 Fed. (2d) 145) and

certiorari was thereafter denied by this Court (323 U. S. 740). In the *Tennant* case, *supra*, negligence was found to exist in the failure to give the employee any warning that the movement would be made as required by one of the employer's operating rules, there being no proof that the employee observed the movement when it started or knew that it was under way. If in that case it had appeared from undisputed evidence, as it does in this, that the employee saw the cars approaching, knew that they would be required to proceed past him, and yet failed to make any use of his own senses to protect himself from injury, and when, if such use had been made, the injury could have been easily avoided, the case would be more in point on the facts, but the opposite result would surely have followed.

A factual situation in no respect comparable to that in the present case is also disclosed by the opinion of this Court in *Lavender v. Kurn, et al.*, —— U. S. ——, 98 L. Ed. 692. It is shown therein that the deceased, Haney, who was employed as a switch tender, was at the time of the accident required to discharge his duties in the vicinity of a certain switch, adjacent to which the ground was uneven, which may have permitted him to have been struck upon the head by an apparently defective mail hook suspended to the side of a car in such manner as to permit it to swing out as much as 12 or 14 inches from the side of the car. The accident occurred in a dark portion of the yards and there was no other proof nor evidence that the deceased knew or was chargeable with knowledge of the propensity of the particular mail hook which was found to have caused the injuries resulting in his death.

CONCLUSION

The undisputed evidence in this case makes it manifest that the decision of the Nebraska Supreme Court is the only decision which can be justified under the existing law. Negligence is made the foundation for the employer's liability under this Act by the Congress. It has not seen fit to change that foundation, nor to make a jury's verdict conclusive that negligence did or did not exist on the part of the employer. The whim or desire of a jury, evidenced by its verdict but without substantial proof to support it, should be no more secure from judicial correction in cases brought under this statute, than under other similar statutes, or the common law, where substantial proof of negligence is also prerequisite to liability. If liability is to be imposed on the employer without regard to fault or negligence, or if the initial determination made by the fact-finding body is to be accorded a sanctity which does not exist in other cases, it is the Congress which should assume that responsibility. This, Congress has not seen fit to do. On the contrary, the retention of dual jurisdiction of the State and Federal Courts in these cases and of negligence as the basis for liability, rather than an administrative determination of the right of compensation for industrial injury, discloses a clear intention on the part of Congress that liability shall exist, only when substantial proof of negligence on the part of the employer has been adduced in the traditional manner. The evidence in this case shows that the only negligence proven was the negligence of Petitioner himself.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 320.—October Term, 1946.

Newton W. Ellis, Petitioner, *v.* Union Pacific Railroad Company.	On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[February 3, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was crushed between a moving railroad car and a building while working for respondent railroad as an engine foreman in charge of a switching crew. Damages for personal injuries were sought in a Nebraska state court under the Federal Employers Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.* Judgment was rendered for petitioner on a jury verdict for $10,000, but on appeal the state Supreme Court reversed for insufficiency of evidence to show negligence, and ordered the complaint dismissed. 146 Neb. 397, 19 N. W. 2d 641; — Neb. —, 22 N. W. 2d 305. We granted certiorari because of an apparent conflict between that decision and *Lavender* v. *Kurn*, 327 U. S. 645.

Petitioner's evidence tended to show the following: Petitioner, aged 41, had been in the employ of respondent only one year, and had a total railroad experience of two or three years. Just before sunset on March 15, 1943, he was engaged, along with other members of his crew, in backing an engine and box car around a curve on a spur track where visibility was obstructed by a building located on the inside and near the middle of the curve. He was standing on the ground on the same side as the building and to the right of the engine, and was controlling operations by hand signals to the engineer. Engine foremen frequently stand to the right of the engine, on the

engineer's side of the cab. A switchman was located around the curve, out of sight of the engineer, on a loading platform at which the car was to be "spotted". Petitioner moved between the building and the track in an attempt to be in a central position from which he could receive signals from the switchman and relay them to the engineer. As the car moved past petitioner, it caught and pinned the upper part of his body against the wall of the building, causing serious injuries. The situation was deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially. In fact, the place where petitioner was standing was in the one short segment of the arc of the curve where clearance was insufficient. Petitioner was unfamiliar with the area and its hazards; if there was a sign warning of the danger, he did not see it; no effort was made to warn him personally. The nearness of the track to the building created an unsafe place for work. Though the engineer was an experienced railroad worker thoroughly familiar with this particular spur, and though it was his duty to watch petitioner continuously or stop the engine,[1] he failed either to warn petitioner or to stop in time to avert the tragedy. During the operation the engineer could see the right side of petitioner and when he saw petitioner's right foot twisted on the ground, he stopped the train.

Respondent's evidence, on the other hand, tended to establish the following: Petitioner was inconsistent in his statements, and it actually appeared that he had worked around this spur a number of times. The clearance, once adequate, was impaired by a subsequent extension of the

[1] The engineer was required to have some member of the crew in sight at all times when the engine was in motion. At the time of the accident the undisputed testimony indicated that petitioner was the only member of the crew that the engineer could see. The engineer testified that he watched petitioner continuously.

building over which the respondent had no control. Neither the overhang of the car nor the pitch of the curve was unusual. Respondent maintained, near the building and some eight feet above the ground, a prominent, legible sign reading "IMPAIRED CLEARANCE". It was not required or desirable that petitioner stand between the building and the track; he could equally well have performed his functions on the left, or safe, side of the engine. He did not stand where he could see the switchman, and, in fact, it was not necessary for him to relay signals from the switchman since the engineer would be in a position to watch the switchman himself when the car approached the loading platform. The engineer had not worked on the ground and was not aware of the precise hazard; his distance from the petitioner (about 60 feet) and the configuration of the building were such that it was not apparent that the petitioner was in peril. That the engineer was vigilant is somewhat supported by the fact that the train was moving only one or two miles an hour and that he stopped it almost instantly, and within a distance of 12 or 14 inches, when petitioner was pinned between the car and the building.

From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way. In that view of the case the accident would be an unforeseeable, freak event or one caused solely by petitioner's own negligence. On the other hand, it would not have been unreasonable for the triers of fact to have inferred that it was proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was insufficient warning to a man on the ground, and that consequently

petitioner was not furnished a safe place to work.[2] And the jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner. 45 U. S. C. § 53.

The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury. 45 U. S. C., § 51; *Brady* v. *Southern Ry. Co.*, U. S. 476, 484. Whether those standards are satisfied is a federal question, the rights created being federal rights. *Brady* v. *Southern Ry. Co., supra; Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350.

The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Lavender* v. *Kurn, supra.* Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra*, p. 652. And where, as here, the case turns on

[2] The duty of the carrier to furnish a safe place to work "is not relieved by the fact that the employee's work in the place in question is fleeting or infrequent." *Bailey* v. *Central Vermont R. Co., supra*, p. 353.

controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 572; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 68.

We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned.

Reversed.